

Testimony of
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STATEMENT OF HARVEY S. PERLMAN BEFORE THE ANTITRUST SUBCOMMITTEE
OF THE SENATE JUDICIARY COMMITTEE

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Chairman Kohl, Senator Hatch, and Members of the Subcommittee, I am Harvey Perlman, Chancellor of the University of Nebraska-Lincoln. I have served in that position since April 2001 and was Interim Chancellor of the University for several months before that. I received both my undergraduate and law degrees from the University of Nebraska-Lincoln. I have been on the faculties of both the University of Nebraska and University of Virginia Law Schools and was dean of the University of Nebraska College of Law from 1983-1998. As the new chair of the group of university presidents who oversee the Bowl Championship Series ("BCS") arrangement, I appreciate the opportunity to appear here today to discuss this matter with you.

When I last appeared before the full Judiciary Committee to discuss the BCS in October 2003, I addressed many of the issues that I understand are the focus of today's hearing. Several changes have been made in the BCS since that time, but the arrangement has continued to bring substantial benefits for college football, enhancing both the bowl games and the regular season. It has the support of a broad majority of university presidents and, in my view, continues to be the fairest and most sensible way to determine a national champion in the Football Bowl Subdivision in light of the myriad academic, athletic, and economic considerations that face our institutions and the long-standing relationships between certain conferences and bowls that have been integral to the development and growth of college football.

I will address the major issues that I understand are central to opposition to the BCS in more detail below, but at the outset, there are some basic, pragmatic considerations that should be stated clearly. Lost in the criticism of the BCS or in the suggestion that the BCS is somehow an illegal agreement among competitors is one crucial and fundamental fact: No matter what system is used to crown a college football national champion (assuming that any such system exists at all), it must be the product of an agreement - one that wins the support of the vast majority of conferences and universities. No conference or university can be forced to participate in some arrangement that it does not find to be in its best interest. Thus, whether we use the BCS or some other arrangements, whatever emerges must be an agreement attractive enough to earn the voluntary participation of many different conferences and universities. In other words, there must be some agreement among the participants on how a champion is going to be determined. The only question is what form that agreement will take.

Why is that so? The answer is simple: Neither the public that watches the games nor the television networks and bowl organizations that provide the revenues that make any

championship structure economically viable will consider any arrangement that does not include teams such as Oklahoma, Texas, Florida, Georgia, Penn State, Miami, Florida State, Notre Dame, West Virginia, USC, Ohio State, Michigan, and my own university, the University of Nebraska, to be viable. If those teams and their conferences cannot be persuaded to participate, there will be no national championship. With all due respect, this is not true of the other conferences. And so, because no conference or institution can be compelled to participate, anyone who sets about to create a national championship arrangement must take into account numerous factors that will affect conferences and institutions individually.

The BCS addresses those factors. It alone can obtain the requisite participation of all of those needed to make a viable championship structure precisely because it alone is able to meet the major concerns of each of the conferences and Notre Dame. In short, it is the format on which the 11 Football Bowl Subdivision conferences and Notre Dame have been able to agree.

If the antitrust laws prohibit such an agreement, then the only alternative is to return to the old bowl system that operated from 1902 until 1991. Each conference would negotiate its own bowl arrangements individually with the many bowls. While that system was relatively successful, it did not provide the assurance of a game between the two highest ranked teams. Rather the national championship was determined by the various press associations that provided rankings of their own. Significantly, it also did not result in broad access for all conferences to major bowl games or sharing of revenues among the participating conferences and universities. Each conference would earn bowl berths and revenues based solely on its individual attractiveness to bowls and television networks. For some conferences, that worked well. For others, it was demonstrably inferior to the BCS. For reasons that I do not understand, those in the latter camp are among the most vociferous critics.

In 2004 the concerns of the five conferences without annual automatic berths in the BCS bowls were addressed and additional access and revenues were provided to those conferences. After lengthy negotiations in which I was personally involved, an agreement was reached that provided the automatic qualifying conferences sufficient access and revenues to retain their participation and accorded the other five conferences additional access and revenues. In addition, a mechanism was provided that provided a pathway to becoming an automatic qualifier based on overall conference success in football. This was not an easy negotiation. We understood, and were confirmed in the marketplace, that the addition of the additional five conferences would not add substantial revenues to the overall BCS agreement. Our media partners indicated they would not substantially increase rights fees based on these changes, and in fact, the media rights fees for the BCS games on a per game basis for the 2007-2010 period are lower than those that were paid for the 2003-2006 cycle. Nonetheless, we thought that it was best for college football to make the change.

It is not possible to begin a rational discussion about college football's post-season and about the game in general until this background is understood. Those who seek a radical restructuring of the BCS or the post-season more broadly continue to ignore these basic realities. That is why Dave Frohnmayer, the recently retired president of the University of Oregon, my predecessor as chair of the committee of university presidents who oversee the BCS, and a former Attorney General of Oregon, correctly pointed out that the signal flaw in the many alternative post-season

proposals is their lack of any plan that can command the participation of those who are necessary to make them work from an athletic or economic perspective.

With this background, let me turn to the issues that I understand are the focal points of the hearing today.

THE BCS ALLEGEDLY DENIES "FAIR OPPORTUNITY" TO PARTICIPATE IN CERTAIN BOWL GAMES

When I last appeared before the full committee on this matter in October 2003, I addressed the subject of "access" to bowl games at length. What I said then remains no less true today. The BCS does not deny any conference or institution or student-athlete a "fair opportunity" to compete in certain bowl games or to play for a national championship; on the contrary, it enhances those opportunities far beyond what would exist were the BCS to disappear.

During my previous appearance, I placed this issue in the context of higher education generally. Each institution has strengths and weaknesses. Some have great economics departments; some are renowned for their instruction in English or the arts; some are well known for business and others for particular science departments. These pillars of strengths at each of our universities were created by conscious investments, great leadership, natural advantages, significant philanthropic donations, dumb luck, or a combination of these. All students, like student-athletes, can make individual choices among the strengths of the various institutions in which they could enroll and these choices may enhance or diminish their future opportunities. Athletic departments are no different from any other university department. Some are simply better than others for historical reasons or natural advantages. I am not aware, however, of any legal means to change that reality. These facts are no less salient today. We cannot all be above average in every endeavor.

What has changed, however, is the structure of the BCS. Since my last appearance, the opportunities for the five conferences whose champions do not have annual automatic berths in the BCS bowls have been substantially increased. In October 2003, a team from one of those conferences had to finish in the top six in the Final BCS Standings to be guaranteed a berth in one of the BCS bowl games. I was part of a group of presidents and conference commissioners that worked together in 2004 to expand the BCS arrangement to include a fifth game and to ease the standards to enable the champions of those conferences to earn an automatic berth and to be considered by a bowl on an at-large basis. Today, the highest-ranked champion of those five conferences earns an automatic berth in a BCS bowl game if either: (1) it is ranked in the top 12 in the Final BCS Standings or (2) it is ranked in the top 16 in the Final BCS Standings and ranked ahead of at least one champion of a conference that has an annual automatic berth. Such team may be selected at-large by a bowl if it is ranked in the top 14 of the Final BCS Standings. Since those standards took effect for the BCS games in January 2007, a champion from one of the conferences without an annual automatic berth has earned a slot in a BCS game every year. On top of this guaranteed access, teams from those five conferences will also play in the national championship game if they finish ranked first or second.

This level of participation for teams from those conferences in the BCS games is unprecedented. In the years from the end of World War II through the 1991 football season, teams from those leagues played in the current BCS bowls six times. In the last five years alone, teams from those

leagues have played in the BCS bowls four times. In the next cycle of the BCS arrangement, the Rose Bowl will take a team from one of those conferences the first time that it has an open slot and a team from one of those conferences qualifies for an automatic berth. In the absence of the BCS arrangement, none of these opportunities would be guaranteed to those conferences. I suspect that those conferences fully understand that reality. That is why none of them has ever suggested that the BCS be replaced by the old bowl system in which each conference would be left to fend for itself. Instead, they always seek - in fact, demand - the participation of the six conferences with annual automatic berths and the University of Notre Dame because the participation of those conferences and institutions is necessary to make such guaranteed opportunities available. Thus, the notion that the BCS denies "access" to any bowl game has no basis in fact.

Likewise, the claim that the BCS denies institutions a "fair opportunity" to compete for the national championship has no factual basis. Only two teams can play in the national championship game each year. That means that a team has to be ranked either first or second in the Final BCS Standings to qualify for the national championship. The standard is the same for everyone. Is that a difficult standard to meet? It surely is. But it is no less difficult for Notre Dame or for a team in one of the six conferences with annual automatic berths in the BCS games than it is for any of the teams in one of the other five conferences. There are certainly some years in which one team believes that it should be in the game rather than another. In other words, in some years there is greater consensus about which teams should play in the national championship game than there is in other years. That is hardly an indictment of the BCS. Any system for crowning a national champion necessarily will involve a limited number of teams. Therefore, selection controversies will always exist. No matter what system is in place, somebody is going to have to choose teams. There is no reason to believe that any alternative structure is going to produce any less controversial selections, and undoubtedly those disappointed because a particular team is left out will claim that the replacement system is biased against their favored squad or conference. Thus, the idea that we are going to create some system that eliminates controversy and is somehow "fairer" is also not grounded in reality.

The real issue with respect to "access" and opportunities to play for a national championship is to compare the BCS arrangement with what the post-season would look like if the BCS were to go away. For those five conferences without annual automatic berths, that should be an easy judgment. The BCS is vastly superior to any alternative scenario likely to secure the voluntary participation of the conferences necessary to make the system work, and there is no credible argument to the contrary. I do know that there are many presidents of universities who believe that the only realistic alternative to the current BCS arrangement would be a return to the former bowl system and not an expanded playoff system.

THE DISTRIBUTION OF BCS REVENUES IS FAIR

The other criticism that I understand animates this hearing is the distribution of revenues derived from the BCS arrangement. The five conferences that do not have annual automatic berths in the BCS bowls are guaranteed nine percent of the net revenues from the arrangement. In addition, when a team from one of those conferences plays in a BCS bowl, those conferences are paid an additional nine percent of net BCS revenues. In other words, when a team from a conference without an annual automatic berth for its champion plays in a BCS bowl, those five conferences

share 18 percent of net BCS revenues. This is approximately the same share that an automatic qualifying conference would receive. For the 2008 season, those five conferences received about \$19.3 million to divide among themselves as they saw fit.

Why this revenue distribution should again be controversial is puzzling for a number of reasons, but three stand out. First, the five conferences that do not have annual automatic berths agreed to precisely this revenue distribution in 2004.

Second, if the BCS were to disappear, none of that revenue would exist. Each of the five leagues that do not have annual automatic berths in a BCS bowl would, like every other conference, have to compete for bowl arrangements and whatever payments that they could generate through individual endeavors. Outside the BCS, those conferences have not been able to attract the demand of bowls and their respective television networks that will pay them anything close to what they earn from the BCS arrangement. For example, last year had there been no BCS arrangement, Utah, the Mountain West champion, probably would have played in the Las Vegas Bowl under an agreement its conference has with that bowl. The Las Vegas Bowl paid its two participants a total of \$1.8 million according to its report to the NCAA. If that money was split evenly between the conferences of the two participating teams, then each conference received about \$900,000. By contrast, according to the Mountain West commissioner, the Mountain West received \$9.7 million of the approximately \$19.3 million that the five conferences shared last season. That means that the Mountain West got about 10 times more money from the BCS than it could obtain on its own. By any measure, this is a generous subsidy, considering that the overall revenue generated by the BCS was not enhanced by providing access to the five conferences without automatic bids. Again, it is hard to see how there is anything "unfair" about a payment of such an enormous subsidy.

Third, the \$19.3 million payment to the five conferences exceeded the share, which was slightly less than \$18.7 million, that was paid to each of the six conferences with an annual automatic berth in the BCS games. (Any conference with a second team in the BCS receives an additional \$4.5 million.) The five conferences without annual automatic berths agreed to divide the \$19.3 million among themselves. If any one of those conferences believes that it is entitled to more money, then it can attempt to persuade the other four conferences in that group that their own internal distribution formula is unfair and should be adjusted.

Even in years in which those conferences do not place a team in one of the BCS games, they share in substantial revenues from the BCS. Thus, every conference without an annual automatic berth in a BCS game benefits substantially from the BCS arrangement regardless of whether one of its teams plays in a BCS bowl. In the absence of the BCS, those payments would not exist, and those conferences would be left to make up that revenue through individual efforts. Again, given this reality, no one has ever explained how the BCS can possibly harm those conferences or how those conferences would possibly be better off without the BCS.

A few points are worth noting regarding what revenue means at the institutional level:

? Our total athletic budget at the University of Nebraska is approximately \$75 million, all of which is generated by the athletic department itself. The BCS revenue distribution amounted to about 2% percent of our overall athletic budget.

? At Nebraska, we played 8 home football games in 2008. Each of those games was a sell out,

and we netted about \$3 million for each home game we played.

? The Big 12 Conference, of which the University of Nebraska is a member, received approximately \$23 million from the BCS arrangement this year because we were fortunate enough to have two teams play in BCS games. On average, that was approximately \$1.9 million per member institution. If only one Big 12 team had played in the BCS games, our distribution would have been about \$1.5 million per institution. The Mountain West received \$9.7 million, which is just less than \$1.1 million per member institution.

Given the size of athletic budgets and the sources from which our athletic revenues are derived, the BCS revenue distribution does not explain or drive competitive success of those schools that have traditionally been football powers. The differential in athletic budgets among universities in the Football Bowl Subdivision schools has nothing to do with the BCS, but rather with the differential commitments of fans and donors and the investments schools decide to make in their athletic programs. That will remain true in the future regardless of how the post-season is structured.

ANY ALTERNATIVE POST-SEASON STRUCTURE WILL RAISE THESE SAME ACCESS AND REVENUE ISSUES

Finally, many assume that all of these issues would simply disappear if the BCS were replaced by some alternative system that is supposedly more "inclusive." The generally favored concept is some sort of amorphous multi-game, NFL-style "playoff." Yet when proponents of these ideas are challenged to put these proposals into a concrete form, only cursory study of the proposals is needed to demonstrate that the perceived flaws in the BCS exist in even greater numbers in these alternative structures.

No playoff would be all-encompassing. It would have only a limited number of teams. By definition then, every year, some teams who believe that they are deserving would be "excluded." In short, the "fair access" issue would still arise in this playoff world.

Moreover, the idea that guaranteed slots for certain conference champions will not be a part of a playoff or some alternative structure ignores reality. As I have noted, to make any alternative national championship structure possible, there must be the participation of certain conferences. With only one exception, since the end of World War II, the national champion has either been Notre Dame or is now a member of one of the six conferences that have annual automatic berths for their champions in BCS games. That lone exception occurred in 1984 when Brigham Young University won the national championship. Accordingly, no championship structure can be created without the participation of all of those six conferences and Notre Dame.

That reality has ramifications for the creation of an alternative arrangement. As I noted, participation of any of the necessary conferences in any post-season arrangement is voluntary. Each of those conferences today could, on its own, obtain a valuable bowl berth for its champion. The Big Ten and Pacific-10 have sent their champions to the Rose Bowl since January 1947. The Southeastern Conference has sent its champion to the Sugar Bowl since the mid-1970s. The Big 12 Conference, in which the University of Nebraska plays, has sent our champion to the Fiesta Bowl since the late 1990s. Before the formation of the Big 12, we were part of the Big Eight Conference, and for many years, the champion of the Big Eight played in the Orange Bowl. Given the opportunities available to the Big 12 Conference, I can say

confidently that none of the presidents of our league would support any alternative system that did not guarantee our league champion at least what we could obtain by our individual efforts. The other conferences with annual automatic berths have attractive bowl options as well. If a playoff or other structure is not going to guarantee the Big Ten and Pacific-10, for example, what they can obtain from the Rose Bowl, there is no incentive for those leagues to leave the Rose Bowl for some other alternative system.

The same is true with revenue distribution. We in the Big 12 would not participate in an alternative post-season format that did not guarantee us at least the same amount of revenue that we can get on our own from a bowl arrangement. Otherwise, we would not be carrying out the duties we owe our institutions. Thus, the alternative structure is going to have the same revenue allocation issues that critics claim make the BCS "unfair." In other words, like the putative "access" issue, this asserted problem would not go away with a change in post-season structure.

And I don't want you to think that money is the only driver here. My sense is that the Pasadena Tournament of Roses Association, whose volunteers and staff work tirelessly each year to present the Rose Bowl and all of the other events in the Tournament of Roses celebration, as well as the institutions of the Pacific-10 and Big Ten, who have enjoyed the long-standing tradition of having their champions play in the Rose Bowl, would forego considerable revenue rather than diminish further that tradition. And I know the Big 12 relationship with the Fiesta Bowl is built on considerably more than just revenue.

I also want to address one other refrain that I occasionally hear from BCS critics - namely that the arrangement "excludes" schools in the five conferences without annual automatic berths from any shot at a national championship before the season starts. That contention is inaccurate, but even if we indulge that assumption, it is impossible to understand how the situation would change with a playoff or some alternative structure. A playoff is not suddenly going to alter the quality of football programs at various universities or the overall strength of particular conferences; it is not going to alter regular season schedules or the prospects of any institution. If anything, it would make the likelihood of some Cinderella arising and winning the championship much less likely because any such team would have to win multiple games to be the national champion rather than a single game. The reasons that cause institutions to struggle now are not going to disappear because the format of the post-season changes. Their difficulties are not related to the structure of the post-season but to the qualities of the programs overall, which, as I noted, is a function of their commitments and investments in football and athletics generally. None of those fundamentals changes with the format of the post-season.

What would be changed is the character of college football as a whole. I catalogued the negative effects that are likely to result from a playoff in my testimony in 2003 and the reasons that most university presidents do not support such a post-season structure. Rather than repeat those here, I will highlight two issues that are pertinent to these access and revenue issues - effect on the bowls and fans and effect on the regular season.

Impact on Bowl Games and Fans. A multi-game playoff would substantially harm the existing bowl games and their communities that have been such great supporters of college football over the years and impose unacceptable burdens on the many fans of the game. The bowl games simply cannot be ignored in any consideration of a playoff. Each game is run by a bowl

committee that is itself an independent economic entity. Bowl committees do far more than sponsor football games. Each year, the bowls sponsor major events that showcase local communities and celebrate college football. They generate substantial economic benefits for their host metropolitan areas. A playoff would threaten all of these benefits because television and sponsorship dollars would flow away from the bowls and into the playoff. Many feel, and I personally agree, that a playoff would lead to demise of many, if not all, of the bowl games over time.

Bowl games also provide unique experiences for a number of student-athletes. Today, there are 34 bowl games that provide post-season opportunities for approximately 6,800 student-athletes. For many of these young men, participation in a bowl game is a highlight of their athletic careers. The bowl experience is not limited to three hours on a playing field in a different stadium. It encompasses much more. Bowl committees generally treat student-athletes to several days of events and activities designed to give them a flavor of the local community. These events permit student-athletes to enjoy attractions near the host city and often give them the opportunity to participate in charitable activities sponsored by the bowl committee. These games also allow student-athletes who do not win conference championships but have good seasons to enjoy the rewards of post-season play. If the bowl games disappear, so would those post-season opportunities. For those institutions that are not likely to make the playoff, which will be the vast bulk of the Football Bowl Subdivision, the constriction of post-season opportunities is far more likely to harm their programs than to make them more competitive on the field.

Playoff proponents sometimes suggest that these concerns could be alleviated by playing playoff games at the bowl sites. That will not work. Even the National Football League, whose playoff structure is often held out by many as the paradigm for a college football tournament, plays all of its post-season games, except the Super Bowl, at the home stadium of one of the participating teams. We would have to adopt the same model. We simply cannot ask our fans to criss-cross the country each weekend in December or January to watch their teams play at distant bowl locations. For example, we cannot expect fans of the University of Washington to go to the Cotton Bowl in Dallas for a first-round game one week, then to the Citrus Bowl in Orlando for a second-round game the following week, followed by a semi-final game in the Orange Bowl in Miami the following week, and a championship game in the Rose Bowl in Pasadena the following week. Few people have the time for such constant travel, let alone the financial resources necessary to cover air fare, hotels, meals, and other expenses attendant in such a whirlwind schedule.

Impact on the Regular Season. Finally, a playoff would have a detrimental impact on the college football regular season.

Today, college football determines its national champion largely on the basis of play during the regular season. One of the attributes that gives the game great national appeal is that teams essentially play games of championship importance every Saturday in the fall. That is why college football fans, at least among the Big 12 and other major football-playing conferences, have for years packed mammoth arenas, many in small towns, every weekend. In September, my university will celebrate its 300th consecutive sell out of Memorial Stadium for home football games.

The BCS enhances those games and makes games from different conferences interesting and compelling to fans that might otherwise not have been attracted to a game. Insert a playoff and much of the drama of regular season rivalries would be gone. When undefeated Michigan plays undefeated Ohio State, as occurred in 2006, fans around the country watch with great anticipation because the outcome of that game may have a substantial impact on their favorite team's chances for a national championship. Create a playoff, and the game would not have the same significance. Both teams would be likely to be in the playoffs, and they could play each other again in a matter of weeks in a game that would be invested with greater importance because it would occur later on the calendar. The regular season would become an exercise seeding for a tournament bracket. The championship would be decided later in other games, which we would have arbitrarily invested with greater significance.

Indeed, for all its excitement, that same criticism has been leveled at the NCAA basketball tournament. While fans undoubtedly enjoy "March Madness," the emphasis on a handful of games in March has made regular season basketball and conference championship races much less significant. As with most other university presidents, I do not believe that the great traditions of regular-season college football should be diminished or sacrificed in order to create a post-season structure that would invest a handful of games with great significance at the expense of many other games.

There is also an economic component that also bears on the structure of the post-season. The vast bulk of revenues from football for both individual institutions and individual conferences come from the regular season. That will remain true. Conferences are required by law to sell their regular season television rights individually. Any post-season arrangement that devalues the regular season, therefore, will result in lower television rights fees for individual conferences. No conference can support a post-season arrangement that reduces the value of its television packages. Those conferences will rightly demand that they be made whole. If, for example, a playoff requires the abandonment of conference championship games, a conference that has such a game today and is able to obtain revenue from it will not voluntarily participate in the playoff unless it is made whole. Similarly, if a playoff requires a reduction in the number of regular season games, then institutions that lose substantial dollars will have to be made whole as well. Given these costs, it is highly doubtful that a playoff can generate sufficient revenues to cover losses from the regular season, make any bowls that are harmed whole, and still generate the revenues equivalent to what the bowl system provides today.

In short, those who believe that revenue distribution from the post-season today is "unfair" are likely to find that the situation is far worse under an alternative post-season structure than exists today.

In short, a multi-game, NFL-style playoff solves nothing for college football. This is why the BCS arrangement is a sensible and limited response. It provides the opportunity for a national championship game without producing all of the negative consequences listed above and without interfering with the academic calendar or impinging on the academic missions of our universities.

CONCLUSION

Simply stated, the BCS arrangement provides fans with an annual national championship game -

something that would not exist without it - while providing greater bowl opportunities and revenue for every Football Bowl Subdivision institution.

It has enhanced the game, and I have no doubt that it will continue to provide great benefits to college football and its fans in the future. The BCS is not perfect, but since no perfect system exists, that hardly is a strike against it. It is vastly superior to the alternatives and has been good for the game.

Again, thank you for the opportunity to speak with you today about these matters.